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No. 375

In the

Supreme Court of the United States

OCTOBER TERM, 1937.

THOMAS B. HASSETT, INDIVIDUALLY AND AS FORMER ACTING COLLECTOR, PETITIONER,

v.

E. SOHIER WELCH, ET AL., EXECUTORS, RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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In the

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OCTOBER TERM, 1937.

No. 375.

THOMAS B. HASSETT, Individually and as Former Acting Collector, *Petitioner*,

v.

E. SOHIER WELCH, ET AL., Executors, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R. 20–30) is reported in 15 F. Supp. 692. The opinion of the Circuit Court of Appeals (R. 119) is reported in 90 F. (2d) 833.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered June 1, 1937. (R. 128.) The petition for certiorari was filed on September 1, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether the Joint Resolution of March 3, 1931, and Section 803 (a) of the Revenue Act of 1932 (which amend Section 302 (c) of the Revenue Act of 1926) should be construed to require that in computing the Federal estate tax of a decedent who died November 20, 1932, there be included in his gross estate the value of property transferred by him in 1926 irrevocably to a trust, under which the income was to be paid to him during his lifetime.

2. Whether, if so construed and applied, such amendments to Section 302 (c) violate the due process clause of the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 16–20. The most important clause, for purposes of this case, is that italicized in the following extract from Section 803 of the Revenue Act of 1932 (the italicised portions representing new matter):

> "(a) Section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, . . .*"

This substantially re-enacted the amendment made to Sec. 302 (c) by the Joint Resolution of March 3,

1931. Sec. 302 at all times contained subdivision (h), printed on pp. 16–17, *infra*.

STATEMENT.

The decedent, Frank H. Beebe, died November 20, 1932. The respondents are the executors of his will. (Paragraph 1 of declaration admitted by paragraph 1 of amended answer, R. 3, 15.)

On February 13, 1924, the decedent executed an instrument assigning all property which he should receive under the will of his brother (who was then living) to trustees to hold until the death of the survivor of the settlor and certain other named persons, to pay the income to the decedent himself during his lifetime and after his death to pay one-third of the income to a named nephew during his lifetime, and thereafter to the issue of this nephew; one-third of the income to a named niece during her lifetime, and thereafter to her issue; and one-third to the issue of this niece. Upon the death of the last survivor of the named beneficiaries, the principal of the trust estate was to be paid over, one-third to the then living issue of this nephew and two-thirds to the then surviving issue of this niece *per stirpes*, with cross-remainders. The trust instrument contained no warranty or covenant or any statutory language operating as a warranty or covenant, and no consideration was paid by the beneficiaries to the decedent. (R. 24, 25, 104–108.)

After the death of the brother of the decedent, the decedent on October 22, 1926, by an instrument in writing ratified and confirmed the original trust instrument, making no change in its provisions. (R. 25, 26, 109.)

In 1926 and 1927, the trustees received the property

to which the settlor became entitled under the will of his brother. They have ever since been holding that property and administering it under the terms of the instruments executed on February 13, 1924, and October 22, 1926. (R. 26.)

The Commissioner determined that the value of the property transferred to this trust should be included in the gross estate, and after the deficiency tax was paid denied a claim for refund. Neither in the deficiency letter nor in the letter denying the claim for refund did the Commissioner rely on the amendment to Sec. 302 (c) of the Revenue Act of 1926. (R. 8, 14.) But by amended answer filed in the District Court on February 13, 1936, the Government did assert this as a defense. (R. 15–17.) The District Court decided the case for the Government on other grounds and did not pass upon the questions involved in this petition.

The holding of the Circuit Court of Appeals on the questions involved in the petition is contained in the following paragraph of its opinion (R. 127):

> "At the time of the transfer Sec. 302 (c) of the Act of 1926 applied only to estates transferred in contemplation of death. Since the District Court refused to find as a fact that the transfer was made for that purpose, it is straining the construction of the latter amendments in 1931 to 1932 to apply them to a transfer completed five or six years before. To give to the statutes above referred to a retroactive effect under such circumstances would be a violation of Art. V of the Constitution. *Heiner* v. *Donnan*, 285 U. S. 312; *Nichols* v. *Coolidge et al.*, Exrs., 274 U. S. 531; *Helvering* v. *Helmholz, supra; Poor* v. *White, supra.*"

ARGUMENT.

I.

It is Clear that the Decision of the Circuit Court of Appeals, that the Amendments to Sec. 302 (c) Would be Unconstitutional if Applied Retroactively, is Correct and is Not in Conflict with the Decision of any other Court.

The petition does not allege that there is any conflict between the decision below and that of any other Circuit Court of Appeals, or indeed of any other court.

All of the decisions in point are in accord. See *Smith* v. *United States,* 16 F. Supp. 397 (D. Mass.); *Myers* v. *Magruder,* 15 F. Supp. 488 (D. Md.); *Commissioner* v. *Marshall,* decided June 28, 1937, and not yet reported, (C. C. A. 2d); *Whiting* v. *Commissioner,* 35 B. T. A. Docket No. 78532, p. 10.

The situation presented in two cases decided by this Court is so similar to that involved in the instant case as to be conclusive of the instant case.

In *Helvering* v. *Helmholz,* 296 U. S. 93, the Court held unconstitutional, as applied to a gift made before its passage, the provision of 302 (d) of the Revenue Act of 1926 that there should be included in the gross estate, in determining the Federal estate tax, property

> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, . . ."

A majority of the Court decided the case on two grounds. The holding on the second ground was expressed in the following language of the opinion (pp. 97, 98):

> "Another and more serious objection to the application of Sec. 302 (d) in the present instance is its retroactive operation. The transfer was complete at the time of the creation of the trust. There remained no interest in the grantor. She reserved no power in herself alone to revoke, to alter or to amend. Under the revenue act then in force the transfer was not taxable as intended to take effect in possession or in enjoyment at her death. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. If Sec. 302 (d) of the Act of 1926 could fairly be considered as intended to apply in the instant case its operation would violate the Fifth Amendment. *Nichols* v. *Coolidge*, 274 U. S. 531."

On this last ground all of the members of the Court concurred.

In *White* v. *Poor*, 296 U. S. 98, *supra*, the same provision of the Revenue Act of 1926 was held to offend the due process clause of the Fifth Amendment, as applied to a trust created before its passage.

Section 302 (d) was held to be constitutional as applied to transfers made after its passage.

> *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85.

It is unconstitutional only insofar as applied to transfers made before its passage.

The same objections which exist to Section 302 (d), as applied retroactively, apply to the Amendments to Sec. 302 (c) if applied retroactively. Each undertakes to include as part of the gross estate a transfer which was complete before the applicable statute was passed.

The corpus of the trust estate irrevocably passed out of the decedent as an individual in 1926; and it is the corpus of that estate which the Commissioner is now seeking to tax by virtue of a statute passed after the gift had taken effect. As in the *Helmholz* case,

there remained no interest in the corpus of the trust in the grantor. The situation is consequently like that presented in *Nichols* v. *Coolidge,* 274 U. S. 531, in which the Court said (p. 542):

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death."

None of the cases relied upon by the petition for certiorari is at all in point.

Gwinn v. *Commissioner,* 287 U. S. 224, involved a joint tenancy, and *Third National Bank* v. *White,* 287 U. S. 577, involved a tenancy by the entirety. For purposes of taxation the Court treated tenancies by the entirety and joint tenancies alike, and held that both are taxable, even if created before the passage of the first estate tax act, because the rights of the survivor in such tenancies did not become finally and definitely fixed before the passage of the Act, and that it was the death of the decedent *after* the passage of the Act which "became the generating source of definite accessions to the survivor's property rights".

Milliken v. *United States,* 283 U. S. 15, held that if a gift in contemplation of death is made after the passage of a provision applicable to it, it is no ground for objection that a substantial re-enactment of that provision in a later Revenue Act taxed it at a higher rate.

The petition here, in quoting from the opinion in that case, omitted the following significant extract from the opinion (283 U. S. at pp. 20–21):

> "This Court has held the taxation of gifts made, and completely vested beyond recall, before the passage of any statute taxing them, to be so palpably arbitrary and unreasonable as to infringe the due process clause. *Nichols* v. *Coolidge, supra; Untermyer* v. *Anderson,* 276 U. S. 440; *Coolidge* v. *Long,* 282 U. S. 582."

Prior to the passage of the Joint Resolution of 1931 there was no provision in any Revenue Act similar to that here relied upon. Provisions in earlier acts were held inapplicable to trusts in which a life interest only was retained, *Burnet* v. *Northern Trust Co.,* 283 U. S. 782.

The petitioner also argues that as the grantor lived beyond the dates of the amendatory acts he could have prevented the operation of the tax by relinquishing his life estate, and quotes language from *United States* v. *Chase National Bank,* 82 F. (2d) 157, 158, in support of that contention. But that was a case where the decedent had retained until her death the power to designate the owner of the corpus of the trust. Because of the retention of that power (which was equivalent to testamentary control over the property) it was held that the corpus of the trust should be included in the gross estate under a statute passed subsequent to the creation of the trust. She did not effectively part with the corpus. Thus the trust was taxable on the same principles as were the revocable trusts under *Porter* v. *Commissioner,* 288 U. S. 436, and those dealt with in the first part of the decision in *Reinecke* v. *Northern*

Trust Co., 278 U. S. 379. But this furnishes no support for the proposition that where the decedent has effectively parted with the title to and control over the corpus of the property and is powerless to do anything in regard to it, the transfer can be retroactively taxed because he did not desire also to give up his right to the income.

Even if the contention made in the language quoted from the *Chase National Bank* case is sound* as applied to the situation there involved, it is clear that it has no application to the situation here involved. An examination of the Government's brief in *Commissioner* v. *Marshall* shows that this very contention was made in the *Marshall* case, which is exactly like the instant case. Nevertheless the Circuit Court of Appeals for the Second Circuit, which decided the *Chase National Bank* case, decided the *Marshall* case in favor of the taxpayer.

This argument of the petitioner seems particularly far-fetched in view of the fact that, during all of the time after the enactment of the amendment until the death of the decedent, the Treasury Department construed the amendment as not applicable to transfers made prior to its passage. (See pp. 10–14, *infra.*) This was not true of the transfer in the *Chase National Bank* case.

None of the other cases cited in the petition involves estate taxes, and none of them seems to us to have any bearing on the question here involved.

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* The language in question was not necessary for the decision in the *Chase National Bank* case. Exactly the same contention might have been made in *Helvering* v. *Helmholz*, 296 U. S. 93, *supra*, and in *White* v. *Poor*, 296 U. S. 98, *supra*. If it had been sound, those cases would have been decided in favor of the Government instead of in favor of the taxpayers, as they were.

It is true that the constitutionality of retroactive legislation relating to such subjects as income taxes, duties and certain kinds of excise taxes has been upheld. In the field of estate and gift taxes, however, retroactive legislation uniformly has been held invalid. This distinction between retroactive estate or gift taxes and other retroactive taxes is referred to in the opinion in *Reinecke* v. *Smith*, 289 U. S. 172, upholding the retroactive feature of Section 219 (g) of the Revenue Act of 1924, in which it was said (p. 175):

> "Nor do we think the act has such a retroactive effect as to render its requirements arbitrary within the principle announced as to estate and gift taxes in *Nichols* v. *Coolidge*, 274 U. S. 531; *Untermyer* v. *Anderson*, 276 U. S. 440, and *Blodgett* v. *Holden*, 275 U. S. 142. *In those cases the issue was the validity of a tax on a transaction consummated before the enactment of the statute authorizing the exaction.* In the present case the subject of the tax is not the creation of the trusts or the transfer of the corpus from the grantor to the trustees, but the income of the trusts which accrued after January 1, 1924, the effective date of the Revenue Act of 1924. Although the act was passed June 2, 1924, the imposition of the tax on income received or accrued from the beginning of the year has been held unobjectionable. *Cooper* v. *United States*, 280 U. S. 409, 411. Compare *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 379." [Italics ours.]

II.

Congress in Passing the Amendments here Involved did not Intend them to Apply to Transfers made Prior to their Passage, and at Least Until 1934 the Treasury Department Construed them as Inapplicable to such Prior Transfers.

The petition for certiorari states that "on November 7, 1934, the Commissioner promulgated Regulations 80 (Appendix, p. 20, *infra*), which provided that such transfers should be included within the gross estate

unless the transfer was made prior to March 3, 1931, *and* the decedent died prior to June 6, 1932, the effective date of the Revenue Act of 1932", and adds in a footnote this astounding statement:

"The legislative history supports this construction."

It then quotes a statement of Congressman Garner to the effect that the Joint Resolution of March 3, 1931, was not to be retroactive, but that he hoped that the next Congress would make it retroactive. The petition fails to mention the fact that Mr. Hawley, member of the Committee on Ways and Means, in explaining the Resolution on the floor of the House said: "It provides that *hereafter* no such method shall be used to evade the tax." [Italics ours.] (Congressional Record, 71st Congress, Third Session, Vol. 74, Part VII, p. 7198.)

The most significant fact is that the Treasury Department, on its understanding of the matter at the time, ruled that the Joint Resolution should be applied prospectively only.

T. D. 4314 (C. B. X-1, p. 450, approved by the Secretary of the Treasury, May 22, 1931)* was an instruction from the Commissioner in the form of a letter "To Collectors of Internal Revenue and Others Concerned." After quoting the language of the amendment this decision reads:

> "In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S. 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S., 582), *Burnet* v.

* This is nowhere mentioned in the body of the petition for certiorari or in the Appendix thereto, which purports to give the statutes and regulations involved. The text of T. D. 4336, which modifies the regulations, is not given anywhere in the petition or in the Appendix thereto. T. D. 4314 and T. D. 4336 are both printed in full in our Appendix, pages 18–19, *infra*.

> *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.* v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 St. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10.30 P. M., Washington, D. C., time, March 3, 1931."
>
> "Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court."

(Italics here represent italics in original. We specifically call attention to the fact that the words "prospectively" and "after" were italicized. This Treasury Decision has the same effect as a Regulations, and is to be distinguished from mere rulings of the Bureau, as appears by the explanatory statement on the title page of the Internal Revenue Bulletin itself.)

The amendment to Regulations 70 was formally made on April 11, 1932, by T. D. 4336 (which is printed on pages 19–20, *infra*).

The contemporaneous construction of the Treasury Department should not be disturbed.

Section 302 (c) of the Revenue Act of 1926, as amended by the Joint Resolution, was further amended by Section 803 (a) of the Revenue Act of 1932. We submit that, for the purposes of this case, no change was introduced by the second amendment, and we do not understand that the Government contends to the contrary. At the time that Section 803 of the Revenue Act of 1932 was passed, the position of the Treasury Department, as announced in T. D. 4314 and in Regulations 70, 1929 edition, as amended by T. D. 4336, was

that the amendment would only be applied *prospectively,* as we have shown.*

Thus there is strong basis to conclude that Congress, in passing the 1932 amendment, approved the construction placed by the Treasury Department on the 1931 amendment and intended that Section 302 (c), as amended, should be applied in the case of trusts where life estates were retained, prospectively only—that is, only to those trusts created subsequent to the passage of the 1931 amendment.

The reports of both the House Committee on Ways and Means and the Senate Finance Committee relating

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* This seems to have been followed at least until Article 18 of Regulations 80 was approved on November 7, 1934. (This is printed in on p. 20, *infra.*) Apparently, however, it was not until 1936 that the Government actually contended that the amendment made by Joint Resolution or Section 803 (a) of the Revenue Act of 1932 should be applied retroactively.

Thus in *Helvering* v. *City Bank Farmers Trust Co.,* 296 U. S. 85, (argued on Oct. 15, 1935, and decided on Nov. 11, 1935) the Commissioner sought to include in the gross estate property transferred to a trust established in 1930. As appears from the opinion of the Circuit Court of Appeals, 74 F. (2d) 242, 243, the decedent died May 20, 1931, after passage of the Joint Resolution under discussion. The trust there in question provided that the income should be paid to the decedent herself until her death or the termination of the trust, after her death to her husband, with gifts over to her children and other descendants. The trust was consequently very similar to the trust here involved. But it does not appear from the opinions of the Board of Tax Appeals, of the Circuit Court of Appeals or the Supreme Court that in any of these tribunals the Government argued that the property could be included because of the Joint Resolution. If there had been any merit in such a contention it is remarkable that the matter was not mentioned in any of the three opinions. The Government lost the case both in the Board and in the Circuit Court of Appeals, and it seems fair to assume that in the argument in the Supreme Court it would have taken the position which it is now taking in the instant case if it had considered it even arguable.

In *Kienbusch* v. *Commissioner,* 34 B. T. A. 1248 promulgated October 28, 1936 it appears affirmatively that the Government did not contend that Section 803 (a) of the 1932 Act could be applied retroactively.

to Section 803 state that its purpose was to clarify in certain respects the amendments made by the Joint Resolution of March 3, 1931, and contain the following language:

> ". . . Certain new matter has also been added *which is without retroactive effect.* . . ." [Italics ours.]
>
> (Report of Committee on Finance, Senate Report No. 665, 72d Congress, 1st Session, p. 49.)

Any reason that could be advanced for making the provisions of the amendment, as clarified, retroactive would be equally applicable to the new matter introduced in the 1932 amendment. The statement of the two committees is therefore of great significance, for it is explicable only upon the basis that the committees believed that the whole subject matter of the 1931 and 1932 amendments to Section 302 (c) would be without retroactive effect.

The petitioner argues that subsection (h) of Sec. 302 requires that the amendments to Sec. 302 (c) be construed retroactively. Exactly the same contention was made and was overruled in *Industrial Trust Company* v. *United States*, 296 U. S. 220, involving Sec. 302 (g) of the Revenue Act of 1926.

The present construction of the Treasury Department*, to which the petition (p. 6) calls attention, appears to us to have no possible support in the language of the statute or in any principles of construction or of constitutional law. There is no decision supporting it.

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* Regulations 80, Art. 18 (b), printed p. 20, *infra*.

CONCLUSION.

The decision below is correct. No decision of any other court is in conflict with it. It is required by previous similar cases decided by this Court.

The Treasury Department is now trying to reverse the position which it originally took and is making contentions which were never advanced until recently. Its erroneous and shifting contentions have forced the respondent executors to fight the case through two courts. It is submitted that they should not be put to the trouble and expense and delay involved in a hearing in this Court, which we believe can result only in an affirmance of what the Court below has decided.

The petition should be denied.

Respectfully submitted,

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September, 1937.

APPENDIX.

STATUTES AND REGULATIONS INVOLVED.

Statutes.

Section 302 of the Revenue Act of 1926 (44 Stat. 70-71) provided:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> . . . .
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."
>
> . . .
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g)

of this section shall apply to transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."

The Joint Resolution (Pub. 131) (46 Stat. 1516), approved March 3, 1931, amended subsection (c) to read as follows:

"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

Section 803 of the Revenue Act of 1932 (47 Stat. 279; 26 U. S. C. § 411 (c)) provided:

"(a) Section 302 (c) of the Revenue Act of 1926 as amended by the Joint Resolution of March 3, 1931, is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an ade-

quate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

Regulations.

Internal Revenue Bulletin, Cumulative Bulletin X-1 pp. 450–451.

TRANSFERS BY DECEDENT IN HIS LIFETIME.

REGULATION 70 (1929), ARTICLES 17 AND 18: X-22-5086
General (transfers intended to take effect T. D. 4314
in possession or enjoyment at or after death).

Estate tax—Joint resolution of March 3, 1931.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Section 302 (c) of the Revenue Act of 1926 was amended by a joint resolution (Pub. 131), approved 10:30 P. M., Washington, D. C., time, March 3, 1931, to read as follows (the portion added by the amendment is in italic):

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S.,

238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long*, (282 U. S., 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.*, v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 St. Ct., 343), the portion added by the amendment to section 302 (c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302 (h) of that Act, be applied *prospectively* only, *i. e.*, to such transfers coming within the amendment as were made *after* 10:30 P. M., Washington, D. C., time, March 3, 1931.

Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302 (c) of the Revenue Act of 1926 and the above decisions of the Supreme Court.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved May 22, 1931.
A. W. MELLON,
Secretary of the Treasury.

Internal Revenue Bulletin, Cumulative Bulletin XI-1, p. 329:

REGULATIONS 70 (1929), ARTICLE 18: Reservation of income or an annuity. XI-16-5455 T. D. 4336

ESTATE TAX—TRANSFERS

Article 18, Regulations 70 (1929 edition, as amended by Treasury Decision 4825 [C. B. IX-1, 356], amended.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Article 18 of Regulations 70 (1929 edition), approved March 23, 1929, as amended by Treasury Decision 4285, approved March 15, 1930, is further amended to read as follows:

ART. 18. *Retention of possession, enjoyment, or income.*—Any transfer which was made by the decedent after 10.30 P. M., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoy-

ment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included.

DAVID BURNET,
Commissioner of Internal Revenue.

Approved April 11, 1932.

OGDEN L. MILLS,
Secretary of the Treasury.

Treasury Regulations 80 (approved Nov. 7, 1934)

ART. 18. Transfers with possession or enjoyment retained. — *(a) Transfers included.* — The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death", includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)

(b) Taxability.—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedet subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 P. M., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 P. M., eastern standard time, June 6, 1932. See section 506 of the Revenue Act of 1934.